Filed 2/6/15 In re F.J. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re F.J. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. V.J., Defendant and Appellant.	E061543 (Super.Ct.Nos. J246031; J246032; J246033) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. A. Rex V., Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Adam E. Ebright, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

In this juvenile dependency proceeding, defendant and appellant V.J. (Father) appeals from orders terminating his parental rights with respect to his three children, D., V., and F. The orders were made at a hearing held pursuant to Welfare and Institutions Code section 366.26.[1] Father contends there is insufficient evidence to support the court's finding that the children are adoptable. We reject this argument and affirm the court's order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*

In a prior dependency case that began in 2007, the children were removed from their parents and placed for a time in their maternal grandfather's home. That case was dismissed in 2009 and their mother was given sole legal and physical custody. A second dependency case began in 2010 and ended in October 2011, with Father getting sole physical custody of the children.

In September 2012, D. was 10 years old; V. and F. were seven years old. They were living with Father and Father's girlfriend, A. Martinez. After being evicted from their apartment, they lived in a motel, in Father's truck, and, most recently, in an

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

abandoned, insect-infested house with broken windows and no electricity. Their bodies were covered with new and old bumps, scabs, and scars. They did not always have enough food, and ate at churches and shelters.

The children told a social worker about acts of domestic violence between Father and Martinez, including a recent incident in which Martinez stabbed Father in the shoulder and leg. They said they felt safe with Father, but not with Martinez. They indicated they would prefer to live with their maternal grandfather. The children were taken into protective custody and placed in the maternal grandfather's home.

Plaintiff and appellant San Bernardino County Children and Family Services (CFS) filed juvenile dependency petitions concerning the children. After a jurisdictional/dispositional hearing held in October 2012, the court sustained the petitions, finding true allegations based on section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). The children were removed from the parents and their placement with maternal grandfather continued. Reunification services were ordered for Father. Services for the mother were denied.

At a six-month review hearing, the court found that Father's progress toward alleviating or mitigating the causes necessitating placement had been minimal, and authorized continued reunification services.

In a report prepared for the 12-month review hearing, the social worker reported that Father had obtained employment and moved into a two bedroom home in San Bernardino. He had missed two random drug tests, but other tests were negative. He told

the social worker "he [was] no longer with Ms. Martinez." Father was not always consistent with visits, but would call to cancel when he could not make the appointment. There were no problems with the visits and the children expressed their desire to have overnight visits with Father. He was participating in case plan services and had successfully completed parenting classes. CFS recommended that reunification services for Father continue and that unsupervised weekend visits be allowed.

On October 16, 2013—the day before the scheduled 12-month review hearing—CFS changed its recommendation; it now sought termination of Father's reunification services and the setting of a section 366.26 hearing. The change was prompted by information that Father had recently been arrested for public intoxication and involved in domestic violence with Martinez, who had been living with Father. As a result of this incident, Father and Martinez's four-month-old child was taken into protective custody.

According to the social worker, this recent incident indicated that Father continued to be involved in domestic violence and substance abuse, and had not benefited from reunification services. It also showed that Father "continues to be dishonest with [CFS] regarding his relationship with Ms. Martinez and her residing with him." The review hearing was set contested and continued to January 2014. At that hearing, the court terminated services and set a hearing to be held pursuant to section 366.26.

B. *Adoptability and the Section 366.26 Hearing*

In a report prepared in May 2014 for the section 366.26 hearing, CFS provided its assessment of the children's adoptability. D. was 11 years old, V. was nine years old,

and F. was eight years old. By the time of the hearing in July, D. had turned 12. They are African-American and each is reportedly healthy and without medical concerns. They are all developmentally on target for their respective age group and have age appropriate verbal skills. They enjoy playing outside.

D. is getting low to average grades in sixth grade and "tends to be lazy in completing his work." He has also displayed behavioral concerns in his placement, such as arguing with his caregiver and not following the rules of the home. He is participating in counseling and "his behavior is slowly improving."

V. is in third grade and "is grasping the material adequately." He is also "mentally and emotionally stable."

F. is in second grade. She "is behind in reading, and has difficulty understanding the school material. However, she is slowly making progress." Like V., she is mentally and emotionally stable.

CFS identified maternal grandfather as the children's prospective adoptive parent. According to the social worker, the "maternal grandfather . . . has expressed his love for the children, and commitment to adopting them. The children have appropriate parent-child relationships with [maternal grandfather], and seek him out for support and guidance." The maternal grandfather said he wanted to adopt the children because: "'I want them to have a good start, and a good life. I want them to go to college and be a well ordered adult [*sic*]. I want them to be balanced, and take care of themselves.'"

Maternal grandfather's wife is not the biological grandparent of the children. According to the social worker, the wife "does not wish to adopt the children along with [maternal grandfather]." The record is silent as whether the maternal grandfather's wife was willing to consent to maternal grandfather's adoption of the children.

The social worker explained adoption to the children and asked them about being adopted by maternal grandfather. D. said, "'Ok, that's fine. I want to stay with my grandpa,' [V.] stated, 'Sure, I'm ok with that,' and [F.] reported, 'Yes, I want to stay here [at maternal grandfather's home].'"

At the conclusion of the section 366.26 hearing, the court found by "clear and convincing evidence" that each child is likely to be adopted. It then terminated the parents' parental rights and selected adoption as the permanent plan for the children.

Father appealed.

III. DISCUSSION

The juvenile court cannot terminate parental rights unless it finds by clear and convincing evidence "that it is likely the child will be adopted . . . ." (§ 366.26, subd. (c)(1).) The focus of the adoptability inquiry is on the child, "and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family. [Citations.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400; see also *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) A proposed adoptive parent need not be identified and ready to adopt, but "there must be convincing evidence of the likelihood that adoption will take place within a reasonable time. [Citation.]" (*In re Brian P.*

(2002) 99 Cal.App.4th 616, 624.) "Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is 'likely' that the child will be adopted within a reasonable time." (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292 [Fourth Dist., Div. Two].)

"'"Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*."' [Citation.]" (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562; see also *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526.)

"On review, we determine whether the record contains substantial evidence from which the juvenile court could find clear and convincing evidence the child[ren] [were] likely to be adopted within a reasonable time." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.) It is the parent's "'burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order.' [Citation.]" (*In re Jose C.* (2010) 188 Cal.App.4th 147, 158.)

Here, Father asserts that the children's ages—12, 9, and 8 years—make them difficult to place for adoption, as does the fact that they are a sibling set of three. We agree that these facts weigh against the children's adoptability. They are not, however,

determinative. Other uncontradicted evidence weighs in favor of adoptability and supports the court's finding. The children are physically healthy, developmentally on target, have good verbal skills, and enjoy playing outside. V. and F. are described as mentally and emotionally stable. Although D. has displayed "behavioral concerns" by arguing with the maternal grandfather and not wanting to follow house rules, his behavior is improving. No other significant problems are noted. Finally, the fact that a prospective adoptive parent is willing to adopt the children weighs in favor of general adoptability. (See *In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.) Taking into consideration all the factors bearing on the children's adoptability, there is substantial evidence to support the trial court's adoptability finding.

Father relies primarily on *In re Kristin W.* (1990) 222 Cal.App.3d 234. In that case, the children were at least ages 11, 9, and 8 years at the time of the challenged order. (*Id.* at pp. 241, 243.)[2] The social worker had reported that she "'felt that these minors are adoptable and that they would benefit from a permanent plan.'" (*Id.* at p. 253.) Other than this "opinion, there was no evidence presented that [the children] were adoptable." (*Ibid.*) The court then commented that "[i]f the children are not adopted by their foster parents, it might be difficult to place them because of their ages." (*Ibid.*) It concluded

[2] The opinion states that the children were ages 10, 8, and 7 years old when they were detained in May 1988. (*In re Kristin W., supra,* 222 Cal.App.3d at p. 241.) The challenged order was made at a 12-month review hearing held in June 1989. (*Id.* at p. 243.)

that "the social worker's opinion alone should not be held sufficient to support an implied finding of adoptability in this case." (*Ibid*.)

The present case is easily distinguished from *In re Kristin W.* In contrast to that case, the adoptability finding in this case is supported by much more than the social worker's opinion. As discussed above, there is uncontradicted evidence regarding the health, development, and mental and emotional status, as well as the willingness of an identified prospective adoptive parent, that generally weighs in favor of adoptability.

Father next argues that the children were not "specifically adoptable" by the maternal grandfather because there is no evidence that the maternal grandfather's wife is willing to consent to the adoption. She points out that Family Code section 8603 provides that a "married person, not lawfully separated from the person's spouse, may not adopt a child without the consent of the spouse . . . ." The statute presents a legal impediment to adoption: if the prospective adoptive parent's spouse does not consent, the prospective adoptive parent cannot adopt the children. (*In re G.M.* (2010) 181 Cal.App.4th 552, 561.) Here, although the record indicates that the maternal grandfather's wife does not wish to adopt the children herself, it is silent as to whether she would consent to the maternal grandfather's adoption of the children. No evidence on this issue was proffered at trial and the court made no finding on this point.

The Court of Appeal in *In re G.M.*, *supra*, 181 Cal.App.4th 552, was presented with a similar situation. In that case, a married aunt of the children was identified as the prospective adoptive parent. (*Id.* at pp. 557-558.) The social worker's adoptability

assessment raised a question about the aunt's marital status. (*Id.* at p. 558.) However, the record was "silent regarding whether the aunt was lawfully separated or she had secured or could secure her husband's consent to her adopting the children." (*Id.* at p. 560.) On appeal, the children's mother argued that the trial court should have considered whether there was a legal impediment to the aunt's adoption of the children. (*Ibid*.)

Initially, the *In re G.M.* court stated that "evidence of a legal impediment to adoption under the Family Code by an identified prospective adoptive parent is relevant when a social worker's opinion that a dependent child will be adopted is based in part on the willingness or commitment of an identified prospective adoptive parent." (*In re G.M.*, *supra*, 181 Cal.App.4th at p. 562.) Thus, the mother could have asked the social worker or the aunt "about whether the aunt was lawfully separated or had or could obtain her husband's consent to an adoption. The court in turn could have considered any evidence on the subject in evaluating whether it was likely the children would be adopted within a reasonable time. [Citation.]" (*Id.* at p. 563.) The problem with the mother's argument on appeal, the *In re G.M.* court explained, was that she did not adduce any such evidence at trial. (*Ibid*.) "Having not raised the legal impediment question in the trial court, mother failed to properly preserve for appellate purposes her claim of trial court error. [Citations.] She also did not object to the department's preliminary assessment as inadequate in this regard and thus forfeited the opportunity to now place the blame for the silent record on the department." (*Id.* at pp. 563-564.)

Here, like the mother in *In re G.M.*, Father failed to raise in the trial court any issue regarding a legal impediment to maternal grandfather's adoption of the children, and offered no evidence or argument relevant to the issue. Nor did he object to CFS's preliminary assessment of the maternal grandfather in this regard. He has, therefore, forfeited the issue on appeal.

Father asserts that he did draw the court's attention to the "adoptability problem" by noting that the maternal grandfather was married and his wife was not adopting. He is referring to the closing argument of his counsel at the section 366.26 hearing where his counsel stated: "I think that on behalf of the father that he should be allowed to maintain a relationship legally with the children. And I think that here the legal guardianship would be sufficient. [¶] *In the report it indicates while the grandfather is remarried, that his spouse does not wish to be part of the adoption process.* And I think that here while Mother is supporting [adoption, the maternal grandfather] is her father[,] so from a practical standpoint if she acts appropriately, the grandfather may allow some contact. I don't know[,] he may also do that with [Father], however, legally, he's not obligated to allow visitation with either parent. [¶] And from that standpoint, based on [Father] even when the Court reduced his visitation and also made it supervised, that he continues to maintain regular contact. He is appropriate during these contacts. And I think that could be—that relationship with the children could maintain through a legal guardianship." (Italics added.)

On appeal, Father focuses on the one sentence we have italicized and would have us read that sentence in isolation. We decline to do so. Read in context, the comment appears to be used to emphasize the maternal grandfather's connection with the children's mother and the potential for bias against Father regarding visitation. It did not in any way raise the legal impediment issue or preserve it for appeal.

Because Father has forfeited the legal impediment argument and failed to establish that there is insufficient evidence to support the court's adoptability finding, we reject his arguments and affirm the court's orders.

IV. DISPOSITION

The orders appealed from are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.